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No. 549.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al.,

Petitioners,

vs.

BRASHEAR FREIGHT LINES, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

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INDEX.

	Page
Published report of opinions below	1
Statement of case	2
Summary of argument	7
Points and authorities	10
Argument	12
Specification I—	
A. Preliminary suggestions	12
B. Primary question: Are petitioners or any of them proper parties to maintain the motion for damages?	12
C. Equity invests petitioners with the right to maintain the motion for damages	18
D. Statutes authorize the Public Service Commission to collect license fees	21
E. The Public Service Commission has always collected license fees	24
F. Implied powers of the Commission	25
G. Eichholz case holds the Commission is proper party to maintain action for fees	26
H. Attorney-General also may maintain action to collect fees	29
Specification II—	
A. Preliminary discussion	31
B. Did the Three-Judge Court abuse its discretion by overruling the motion for damages?	31
C. Discussion of applicable decisions	33
D. Equity will do complete justice	41
E. Abuse of discretion to disallow expenses of defense	43

Specification III—

A. Duty to remand motion for damages to District Judge 44

Appendix 49

Cases Cited.

Barr v. Lake, 147 Mo. App. 252, 126 S. W. 755 ..... 11, 21
Brashear etc. Co. v. Public Service Comm., 23 F. Supp. 865 1
Camp v. Boyd, 229 U. S. 530 40
Chicago & Northwestern Railway Co. v. Lindell, 281 U. S. 14 43
Columbia Terminals v. Lambert et al., 309 U. S. 620 .. 46
Eichholz v. Hargus et al., 23 Fed. Supp. 587 ..... 10, 26, 27
Frank Eichholz v. Public Service Commission, 306 U. S. 268, l. c. 269 28
Fears v. Riley, 147 Mo. 453, 48 S. W. 828 ..... 11, 44
Greenway v. James, 34 Mo. 328 ..... 11, 21
Grover v. Kirk, 187 Mo. App. 720 ..... 10, 16
Helvering v. Gowran, 302 U. S. 238, 58 S. Ct. 154 .... 10, 16
Helvering v. Minn. Tea Co., 296 U. S. 378, 56 S. Ct. 269 ..... 10, 20, 45
Hoffman v. Parry, 23 Mo. App. 20 ..... 11, 21
Inland Steel Company v. United States, 306 U. S. 153 ..... 11, 40
Joplin State Bank v. Heaton (Mo. App.), 180 S. W. 19 ..... 11, 44
Lehman v. Krentler-Arnold Hinge Last Co., 284 U. S. 448 42
McCrone v. United States, 307 U. S. 61 ..... 10, 16, 30
North American Accident Ins. Co. v. Tebbs, 107 Fed. (2d) 853 ..... 10, 16
Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485 ..... 11, 40

Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273 40
Public Service Commission v. Brashear et al., 306 U. S. 204, 114 Fed. (2d) 1 ..... 1, 17, 45
Railroad Commission v. Pacific G. & E. Co., 302 U. S. 388 42
Russell v. Farley, 105 U. S. 433 ..... 11, 39, 40
Sovereign Camp v. Murphy, 17 Fed. Supp. 651 42
State ex rel. Winn, State Treasurer, v. Banks (Mo. Supp.), 145 S. W. (2d) 362 ..... 10, 19, 22
Sterling v. Constantin, 287 U. S. 378 41
United Motors Service, Inc., v. Tropic-Aire, Inc., 57 Fed. (2d) 479 ..... 11, 33, 35, 41
Virtue v. Creamery etc. Co., 227 U. S. 8, 33 S. Ct. 202 ..... 10, 20, 45
Young Co. v. McNeal-Edwards Co., 283 U. S. 398, 400 .. 42

Statutes Cited.

Revised Statutes of Missouri 1929:
Sec. 698 ..... 10, 18
Sec. 11276 ..... 10, 19, 22, 29
Sec. 11425 ..... 10, 22
Sec. 5229 25
Sec. 5268 ..... 21, 49
Sec. 5272 ..... 10, 19, 23
Sec. 5279 33
Sec. 7761 22
Sec. 230, Title 28, U. S. C. A., 43 Stat. 940 17

Rules Cited.

Rules of Civil Procedure for District Courts of the United States:
Rule 13 16
Rule 17 ..... 10, 16, 18
Rule 18 ..... 11, 34

Rule 19 .....11, 34
Rule 20 .....11, 33, 34
Rule 22 .....11, 34
Rules of Practice in Equity:
Rule 30 .....11, 16, 30
Rule 31 .....11, 30
Rule 37 .....10, 18
Rule 69 .....10, 16

Textbooks Cited.

Simkins Federal Practice, Revised Edition, 1934, Sec. 874, p. 816.....10, 16
Simkins Federal Practice, Revised Edition, 1934, Sec. 708, p. 669.....11, 30
32 Corpus Juris 442.....11, 44

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the Three-Judge Court is reported as Brashear Freight Lines, Inc., et al. v. Public Service Commission et al., 23 F. Supp. 865; that of the Supreme Court on the direct appeal is Public Service Commission v. Brashear, 306 U. S. 204, 59 Sup. Ct. 480. The opinion of the Circuit Court of Appeals appears as Public Service Commission et al. v. Brashear Freight Lines, Inc., et al., 114 F. (2d) 1. Certiorari was granted in memorandum opinion, 61 Sup. Ct. 392.

GROUNDS ON WHICH JURISDICTION INVOKED.

Petitioners sought a writ of certiorari from this Court to the Circuit Court of Appeals, Eighth Circuit, by petition filed November 4, 1940. The writ was granted December 16, 1940 (R. 107).

Petitioners based their application on Section 240, Judicial Code (28 U. S. C. A. 347), and on Supreme Court Rule No. 38.

Respondents filed a brief in which they urged that no case for relief by way of certiorari was presented.

STATEMENT OF THE CASE.

May 15, 1937, respondents filed a bill in equity against petitioners, seeking to enjoin them from stopping or interfering with the operations of respondents as interstate motor carriers in Missouri. More particularly the petition charged that the Missouri Bus and Truck Law (Laws of Mo. 1931, as amended, R. S. Mo. 1929, Sec. 5264 et seq.) was unconstitutional. After hearing the bill was dismissed by the Court (R. 61).

A counterclaim, filed by petitioner Public Service Commission alone, was dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action thereon (R. 67).

After an abortive appeal here (R. 76), all petitioners filed a document styled "Motion for Damages" (R. 79). This was overruled (R. 83) (as was a motion to reconsider it [R. 83 and 89]). An appeal was taken to the Circuit Court of Appeals. Appellees there, respondents here, filed a motion to dismiss the appeal (R. 97) and a brief on the merits (R. 98).

By opinion (R. 99) and decree (R. 105) the Circuit Court of Appeals affirmed the action of the Three-Judge Court

in dismissing the motion for damages. No ruling was made as to the motion to dismiss the appeal.

So the situation here presented is this:

In June, 1938 (R. 43), the Three-Judge Court filed an opinion, and in August, 1938, rendered a decree dismissing a counterclaim of **one** petitioner against thirty of the respondents. Ten months later, and in the second term thereafter, **all** petitioners filed a so-called motion for damages in the Three-Judge Court seeking relief by way of counterclaim against all seventy-six respondents. This counterclaim included matter previously asserted (and by the Court denied) as to thirty respondents, and, for the first time, asserted a similar claim against the remaining forty-six respondents.

The Three-Judge Court dismissed the motion for damages on the ground that the subject matter and the relief prayed for in it had theretofore been ruled and finally determined in the cause.

The Circuit Court of Appeals held that the Three-Judge Court had discretion to entertain or refuse to entertain the ancillary litigation, and that taking the latter course involved no abuse of such discretion.

We set out below the dates of record entries of significance here, and a statement showing the terms of the District Court during which they were made. Entries deemed of greater importance are emphasized.

OCTOBER TERM, 1937.

May 15, 1937. Bill filed (R. 3);

September 17, 1937. **Answer and counterclaim filed** (R. 26);

September 22, 1937. General denial to counterclaim filed (R. 40). (It was understood that if the issues of the counterclaim became pertinent after trial of

the injunction issue, appellees should have the right to amplify this pleading. See Statement of Appellees to Supplement Appellants' Statement of Evidence [R. 75].)

September 24, 1937. Partial hearing.

January 31, 1938. Hearing resumed and completed.

MARCH 21, 1938, FIRST DAY OF MARCH TERM, 1938.

June 15, 1938. **Opinion of District Court** (R. 43);

July 2, 1938. Findings of fact and conclusions of law of District Court filed (R. 48);

July 26, 1938. **Amended answer and counterclaim of certain defendants LODGED with Court** (R. 55);

August 4, 1938. **Decree dismissing counterclaim** (R. 61);

September 3, 1938. Petition for rehearing and motion to modify decree filed (R. 62);

September 16, 1938. **Order** modifying decree, but nonetheless **dismissing counterclaim and overruling petition for rehearing** (R. 67).

OCTOBER 17, 1938, FIRST DAY OF OCTOBER TERM, 1938.

December 15, 1938. **Motion of certain defendants for "Costs" filed** (R. 73).

December 17, 1938. Statement of appellees, supplementing statement of evidence, filed and approved (R. 75);

February 13, 1938. Appeal dismissed by Supreme Court of United States (R. 77).

MARCH 20, 1939, FIRST DAY OF MARCH TERM, 1939.

April 24, 1939. Mandate of Supreme Court of United States filed (R. 76);

May 22, 1939. **Motion for damages filed** (R. 79);

July 5, 1939. **Order overruling motion for damages** on the ground that subject matter thereof "has heretofore been ruled and finally determined in this cause" (R. 83). This order formed the basis of the appeal to the Circuit Court of Appeals.

October 3, 1939. Notice of appeal to Circuit Court of Appeals (R. 1).

August 26, 1940. Opinion of Circuit Court of Appeals (R. 99).

An analysis of the motion for damages discloses, as stated above, two purported bases of relief. First, it reasserted the original counterclaim for license fees against thirty of the plaintiffs below. (However, the time for which the fees are sought to be collected is reduced from six years to the period subsequent to entry of the restraining order [Par. 3, R. 80]). Second, for the first time is asserted the right against the remaining forty-six plaintiffs below to collect license fees for certain types of operations under the statute (Par. 4, R. 80).

The motion (R. 82) prays that

> "the Court * * * take steps * * * required * * * to ascertain and determine **the amount of license fees** * * * which * * * remained unpaid **and to assess said sum and costs** AS DAMAGES in favor of defendants or the State of Missouri, or the State Treasurer of the State of Missouri * * * and for judgment against plaintiffs for said amount * * *" (Emphasis ours).

Neither the State of Missouri nor the Treasurer of the State was a party to the litigation.

The Missouri Bus & Truck Act prescribed fees for the use of the highways graduated upon a vehicle capacity basis. The act prescribed fees of 50 per cent of the maximum for twenty-mile runs into the state, and 33⅓ per

cent for ten-mile runs. These were referred to as "border city" operations. From the enactment of the law in 1931 until the filing of the instant suit, no effort was made to collect "border city" fees. During the pendency of the case, no effort was made to collect them from carriers not parties to the suit.

A stipulation (R. 77) was entered into providing for the collection of certain fees by a trustee pending the litigation. In this way over $100,000.00 was collected and later turned over to the State Treasurer. Respondents believed the stipulation was not intended to coven "border city" operations (R. 76).

The original counterclaim and the motion for damages dealt solely with fees for these "border city" operations. A general denial was filed to the original counterclaim with the understanding (R. 75) that respondents did not waive their right to attack the counterclaim "for misjoinder, nonjoinder, multifariousness, timeliness, lack of jurisdiction in the statutory Three-Judge Court, or otherwise" (R. 75).

Bonds of ten and twenty thousand dollars respectively were filed by the original plaintiffs (and later interveners), as a condition of the entry of the restraining order. Petitioners did not cause them to be set out in the record here.

Six weeks after rendition of the Three-Judge Court opinion, petitioners LODGED with the clerk an amended answer and counterclaim (R. 55). This was never "filed" or acted upon, nor were any further steps taken with reference to it. In petitioners' brief (p. 5) it is said defendants FILED this amended answer and counterclaim. The verb is an inadvertence.

Six months after the opinion and at a subsequent term,

petitioners Public Service Commission and Attorney-General filed a motion for costs (R. 73). This was never acted upon. Likewise, no further steps were taken with reference to it.

The foregoing by way of modification and amplification is deemed necessary to supplement the statement of petitioners.

SUMMARY OF THE ARGUMENT.

Petitioners summarize their argument under three main specifications. Respondents adopt the same numerical order in dealing with them.

SPECIFICATION I.

Respondents say the Circuit Court of Appeals erroneously assumed that the Three-Judge Court in dismissing the counterclaim and motion for damages acted in the exercise of a "supposed" discretionary right. They contend that really the Three-Judge Court ruled as it did because it had doubt as to the right of defendants below or any of them to prosecute the claim. Petitioners urge, variously, that this latter question, called the primary question, was never decided by the Circuit Court of Appeals (Petitioners' Brief p. 9), but that the Three-Judge Court did decide it, but did so adversely to their contentions (Petitioners' Brief pp. 16 and 17).

Respondents contend that the Three-Judge Court had an unquestionable discretionary right to dismiss the ancillary litigation, and that that Court acted in the exercise of this right. Respondents assume that doubt as to the right of any or all defendants to prosecute the claim, inter alia, entered into consideration of the question. Further, respondents assert that no defendant had such right, that only the State Treasurer could collect license

fees and that he could sue for them only by proceeding in the name and behalf of the state. Neither the Treasurer nor the state was a party defendant.

Respondents contend also that the question of the right of various parties defendant to prosecute the counterclaim or motion for damages was not decided by either the Three-Judge Court or the Circuit Court of Appeals. Indeed, respondents assert that that issue was not before the Circuit Court of Appeals. The question there was whether the Three-Judge Court was justified in overruling the motion for damages inasmuch as the controlling question in it had been previously decided.

SPECIFICATION II.

Petitioners assert that the Three-Judge Court abused its discretion (1) in dismissing the counterclaim and (2) in relegating petitioners to seventy-six separate actions at law or in equity in different forums in numerous states.

Respondents' position is that the Three-Judge Court in its discretion could assume jurisdiction of the counterclaim and motion for damages (if other jurisdictional requirements existed) or not; that no cases deny the existence of this discretion.

The Three-Judge Court by the negative act of refusing to assume jurisdiction of the counterclaim or motion for damages did not perform a positive act of "relegating" petitioners anywhere; if the result of the decree dismissing the motion for damages is that petitioners do sue elsewhere, adequate tribunals, state and federal, are available to them. Accordingly they may have their day in court. In a proper proceeding any and all respondents, including nonresidents, may be proceeded against in the State of Missouri and no doubt in one suit. Also peti-

tioners will be put to no other or further inconvenience than that normally attendant upon the activities of the sovereign in collecting taxes from individual taxpayers.

Petitioners assert there was further abuse of discretion in disallowing expenses of defense. Respondents reply that the motion for damages included no such element; that the field was pre-empted by a previous motion for costs; and that if treated as a motion for costs and expenses the motion for damages fails, inasmuch as it was not filed during the judgment term.

SPECIFICATION III.

Petitioners inquire whether the Three-Judge Court should not have remitted considerations of the counterclaim and the motion for damages to the District Judge for further proceedings. They disavow any interest in the matter now, though they strongly urged its importance in their petition for certiorari.

Respondents answer: if there be such a rule, it does not deprive the District Judge of discretion in handling the matter thereafter. Since District Judge Collet concurred in the action of the other members of the Court in the dismissal of the counterclaim, he would, if the sole arbiter, likewise have dismissed it. Hence petitioners are not harmed. Again the practice (if such there be) of remitting ancillary matters to the District Judge is not automatic. It may be ordered "upon presentation of the facts" by the parties.

No motion was presented or other action taken toward this end. On the contrary petitioners at all times invoked the jurisdiction of the Three-Judge Court. On appeal to the Circuit Court of Appeals they suggested no such matter. Hence the point is foreclosed.

POINTS AND AUTHORITIES.

The judgment of the Three-Judge Court was properly affirmed by the Circuit Court of Appeals if sustainable on any ground.

Helvering v. Gowran, 302 U. S. 238, 58 S. Ct. 154;
North American Accident Ins. Co. v. Tebbs, 107 Fed. (2) 853.

The judgment of the Three-Judge Court on the counterclaim may not be collaterally attacked.

Grover v. Kirk, 187 Mo. App. 720.

Under the Rules of Practice in Equity, a motion for rehearing was valid only if filed to the judgment term.

McCrone v. U. S., 307 U. S. 61;
Simkins Fed. Practice, Revised Ed. 1934, Sec. 874, p. 816;
Rules of Practice in Equity, Rule 69 (in effect during the March Term, 1938).

Suits are maintainable only by the real party in interest.

Rule 17—Rules of Practice in the District Courts of the United States;
Rules of Practice in Equity, No. 37;
R. S. Mo. 1929, Sec. 698.

The State Treasurer was the party to collect the license fees for motor vehicles.

R. S. 1929, Sec. 5272, Sec. 11276 and Sec. 11425;
Eichholz v. Hargus et al., 23 Fed. Supp. 587, opinion of Otis, J.;
See, also, State ex rel. Winn, State Treasurer, v. Banks, (Mo. Sup.), 145 S. W. (2d) 362.

Petitioners may not in this court for the first time attack the record before the Three-Judge Court and the Circuit Court of Appeals.

Helvering v. Minn. Tea Co., 296 U. S. 378, 56 S. Ct. 269;
Virtue v. Creamery etc. Co., 227 U. S. 8, 33 S. Ct. 202.

Under a general denial the pleader may prove any fact going to show claimant never had a cause of action against him.

Hoffman v. Parry, 23 Mo. App. 20, l. c. 29;
See, also, Barr v. Lake, 147 Mo. App. 252, 126 S. W. 755, and
Greenway v. James, 34 Mo. 328.

A counterclaim under Equity Rule 30 must arise out of the transaction which is the subject matter of the suit.

Rules of Practice in Equity, No. 30.

A counterclaim may not be used to introduce new parties.

Rules of Practice in Equity, No. 30 and No. 31;
Simkins Federal Practice, 1934 Edition, Sec. 708.

Claims against several carriers for license fees may now be united in a single suit.

Rules of Civil Procedure for the District Courts Nos. 18, 19, 20 and 22.

The Court trying an injunction matter may in its discretion leave the parties to their remedy elsewhere on ancillary matters.

Inland Steel Company v. United States, 306 U. S. 153;
Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485;
Russell v. Farley, 105 U. S. 433;
United Motors Service, Inc., v. Tropic-Aire, Inc., 57 Fed. (2d) 479.

A motion for costs must be filed during the judgment term.

32 C. J. 442;
Fears v. Riley, 147 Mo. 453, 48 S. W. 828;
Joplin State Bank v. Heaton (Mo. App.), 180 S. W. 19.

ARGUMENT.

I.

A) Preliminary Suggestions.

Here petitioners outline the three main contentions of their brief.

B) Primary Question: Are Petitioners or Any of Them Proper Parties to Maintain the Motion for Damages?

Under this caption (Brief pps. 16 and 17) petitioners state that the Three-Judge Court decided this question, and decided it adversely to their contentions. They maintain that the Circuit Court of Appeals did not decide the question.

As to the first contention, it apparently is inferred from the language of the decree dismissing the counterclaim that the Three-Judge Court **decided** that none of defendants was entitled to prosecute the demand.

The order referred to is as follows:

> "4. That as to the issue raised by defendants' counterclaim, the court being in **serious** doubt as to the right of **the defendants** to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if **they or either of them** shall be so advised." (Emphasis supplied.)

Respondents concede that the Circuit Court of Appeals treated the order as made in the exercise of the discretion lodged in the Three-Judge Court. Respondents maintain that it was so made.

Had the Three-Judge Court **decided** that none of the defendants could have maintained the counterclaim, it

would not have dismissed the counterclaim **without prejudice** to the right to proceed elsewhere.

Furthermore, the Three-Judge Court, without **deciding** the rights of any party, envisaged the possibility of multifariousness and defects as to parties. The dismissal was "without prejudice to the right of the **defendants, or either of them,**" to proceed elsewhere.

Had the Three-Judge Court decided the rights of the parties it would have so indicated instead of, as it did, leaving undetermined the question as to which, if any, of them might maintain an independent action.

It is apposite to state here the petitioners have so little confidence in the point that they abandon it later. Having urged that the counterclaim was decided on the issue of parties and **not on the issue of discretion**, they contend (Brief p. 12) that the Three-Judge Court "refused to do anything whatsoever," and later "in like manner * * * overruled the motion for damages." It is argued, then, that these "transactions" constitute **an abuse of discretion.** Of course, there cannot be an abuse of discretion and a failure to exercise discretion in the same judicial act.

Also, if, as petitioners contend, the issue of parties was **decided** adversely to their interests, that is (but for appellate review), completely foreclosed how can they urge in the same breath (Brief p. 12) that the "act of relegating * * * petitioners to * * * separate actions * * * in many different forums * * * **constitutes an abuse of judicial discretion in itself.**" If the issue had been decided and hence foreclosed, there could doubtless be no "relegation" elsewhere.

Finally, as to this contention, stress is laid upon the statement in the order to the effect that the Court had

doubt, **serious** doubt, as to the right of the defendants to maintain such counterclaim.

To us the very expression connotes the exercise of discretion. It is not decretal language, or language of decision. The Circuit Court of Appeals, when it decides issues, reaches a conclusion. It does not confine its order to the mere expression of doubt concerning the issue. Doubt may lurk behind many decisions. The mere expression of it, without more, does not constitute decision.

The possession of doubt as to defendants' rights may have been, and no doubt was, a factor of importance in the discretionary decision not to entertain the counterclaim. That is not to say there was no exercise of discretion.

On page 17 in the brief petitioners state that the rules of civil procedure govern our scrutiny of the **motion for damages.** This appears doubtful. The motion for damages, it is true, was filed after the effective date of the rules. However, petitioners commingle with their grievances about the treatment of the motion, their grievances concerning the fate of the counterclaim. Thereby they set the standard of judgment. The counterclaim is to be judged by the procedure under Equity Rule 30. This is pointedly evident when we recall the frank confession that the motion was an attempt, after expiration of the time for appeal to the Circuit Court of Appeals from the ruling on the counterclaim, to create the semblance of timeliness. Petitioners state (Brief p. 7):

> "After the Supreme Court, for want of jurisdiction, had dismissed the aforesaid direct appeal taken from the adverse decree of the District Court on the Counterclaim, it was too late for defendants to appeal from such adverse ruling of the Three-Judge Court on the counterclaim to the Circuit Court of Appeals. They,

> therefore, conceived it to be proper to incorporate the same subject matter of the Counterclaim * * * in a Motion for Damages."

At the bottom of page 17 statements are made indicating that petitioners misconceive, in other respects, the nature of the order.

The Three-Judge Court declined, in its discretion, to entertain jurisdiction of the counterclaim. This was a **negative** act, so to speak. It did not, as petitioners assume, perform the further **positive** act of "relegating" them, or either of them, eleswhere. To relegate means to send. Petitioners, if this order is upheld, are not sent or forced to proceed elsewhere. They can abandon further pursuit of these respondents just as they have of the scores of other carriers similarly situated, not parties to the litigation.

By reference to the views of Judge Otis in his dissenting opinion in Eichholz v. Hargus, 23 Fed. Supp. 587, petitioners infer that in the instant case he acted upon the conviction that "neither the Public Service Commission nor any of the defendants were the right parties to maintain * * *" the counterclaim.

From this the further inference is drawn that the other two members of the court were persuaded to agree with him (Brief p. 18). Inference upon inference erects entirely too tenuous a basis for this conclusion.

Finally, it is said that this Court should decide the question of the right of parties. This desideratum does not follow. The question actually before the Circuit Court of Appeals was the propriety of the order of July 5, 1939 (R. 83), overruling the motion for damages on the ground the subject matter thereof had theretofore been ruled and finally determined.

The Circuit Court of Appeals could have sustained the action of the Three-Judge Court as being sound for other reasons. This it could properly have done, regardless of reasons assigned by the Three-Judge Court. And, in turn, its judgment is to be upheld here if sustainable on any reasonable ground.

> Helvering v. Gowran, 302 U. S. 238, 58 S. Ct. 154;
> North American Accident Ins. Co. v. Tebbs, 107 Fed. (2d) 853.

Other reasons justifying the action of the Three-Judge Court follow.

The motion constituted, as to thirty defendants, the reassertion of rights already decided by dismissal of the original counterclaim. In that aspect it was a collateral attack on the judgment and therefore ineffective.

> Grover v. Kirk, 187 Mo. App. 720.

If viewed as a motion for rehearing, it was defective because one such motion had already been filed and overruled (R. 62). Furthermore, it was not filed during the judgment term.

> McCrone v. U. S., 307 U. S. 61;
> Simkins Fed. Practice, Revised Ed. 1934, Sec. 874, p. 816;
> Rules of Practice in Equity, Rule 69 (in effect during the March Term, 1938).

On the other hand, the motion for damages constituted, as to the remaining forty-six respondents, the assertion for the first time of a right to affirmative relief by way of counterclaim. A counterclaim must be filed with the answer under the new rules (Rules of Civil Procedure 13 and 17) or the old (Equity Rule 30).

At all odds, a counterclaim may not be first asserted ten months after decree and in the second term thereafter.

No authority for such practice is cited. Beyond peradventure, none can be found.

Viewed in the light of the above considerations, the Three-Judge Court acted properly in its treatment of the motion for damages. It follows that the Circuit Court of Appeals was not in error in sustaining that action.

In addition, the Circuit Court of Appeals could properly have based its affirmance on the ground the appeal was untimely, inasmuch as it was taken more than three months after entry of final judgment in the Three-Judge Court.

Sec. 230, Title 28, U. S. C. A., 43 Stat. 940.

Also, the Circuit Court of Appeals could properly have concluded to affirm the action below, in view of the matter presented in the statement of appellees supplementing the statement of evidence. This was the understanding of respondents, that the stipulation was not intended to cover border city operations. The Court may have considered this understanding justifiable. Viewed in such light the Court then might well have concluded that presentation of a counterclaim was inequitable. Or the view could have been taken that the situation presented a case where there was no meeting of the minds in the stipulation. In that event the Court could have properly concluded that an attempt to try the issue as thus obscured would be unwise.

The Circuit Court of Appeals could have affirmed the Three-Judge order, because it deemed the counterclaim multifarious; or because tax collection suits are not within equity jurisdiction as actions for accounting (Public Service Comm. v. Brashear etc., 114 F. [2d] 1, l. c. 3, note).

It might have concluded, in view of the counterclaim, the amended counterclaim lodged with the clerk, the motion for costs, and finally the motion for damages, peti-

tioners evidenced such a lack of clarity of intention and objective as to justify renouncing jurisdiction.

Finally, the Circuit Court of Appeals in its discretion may have concluded not to entertain jurisdiction of a claim for border city license fees against these carriers, when none was being asserted against other similar operators not parties, i. e., the Court may have thought the move smacked of penalization of respondents by petitioners for seeking the aid of a court of equity.

Any one of these reasons would have afforded adequate reason to support the affirmance.

C) **Equity Invests Petitioners With the Right to Maintain the Motion for Damages.**

This assertion is made, but no authority is cited to sustain it. It is argued that the State is entitled to the money, that the restraining order held up payment, therefore defendants are in equity entitled to recover it. Such argument (if it be assumed, as we deny, that the State or anyone is entitled to anything) is only to say "Respondents owe somebody, so why not let anybody sue them?"

On page 19 respondents suggest that the Public Service Commission "* * * is entitled to maintain on behalf of the State of Missouri, **the real party in interest**, the cause of action stated in the motion for damages." (Emphasis ours.)

If the State of Missouri is the real party in interest, it must bring the suit.

Rule 17—Rules of Practice in the District Courts of the United States.

This was likewise true under the old rules.

Rules of Practice in Equity, No. 37;
R. S. Mo. 1929, Sec. 698.

> "* * * all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, * * * or to enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary * * *"

must be brought **in the name and on behalf of the State.**

R. S. Mo. 1929, Sec. 11276.

It is said omission by plaintiffs to include the Treasurer of the State of Missouri as a party defendant implies they did not deem him "a right party to institute arrests against themselves for collection of license fees * * *" (Br. 19). That implication is correctly interpreted. The further inference, however, that thereby we concede he is not the proper party to maintain action to collect the fees, is indeed a tortured one. The yet additional inference then drawn, that the parties defendant (or some of them) necessarily **are** the proper persons to sue, is yet more tortured, and, in fact, wholly indefensible.

As illustrative of the proposition, we refer to

State ex rel. Winn, State Treasurer, v. Banks (Mo. Sup.), 145 S. W. (2d) 362.

There, to be sure, the state oil inspector endeavored to collect the tax (on gasoline, in that case). But when suit was filed, it was filed in the name of the State, at the relation of the State Treasurer.

The statute under consideration there required a distributor to "pay to the State Treasurer" a certain tax. So with R. S. Mo. 1929, Sec. 5272, here under consideration.

On page 20 respondents contend that the stipulation (R. 20) constitutes a voluntary recognition that "the

Public Service Commission is the right party to whom to pay the license fees in question.' The stipulation contains no such admission. In fact, no attempt was made therein by the Public Service Commission to assert the right to collect. It speaks, on the contrary (R. 20), of liability "to the State of Missouri."

The statement the plaintiffs "released" certain money to the Public Service Commission is deceptive. As a matter of fact, the checks were made payable to the State Treasurer. No respondent objected to this.

Despite the statement on page 20 that defendants below, as agents of the State of Missouri, can maintain the motion for damages, an agent of a disclosed principal may not in his own name sue a third party. Particularly is this true where rights are governed, as here, by specific statutes.

The attack (Br. p. 20) on the supplemental statement (R. 75) comes too late here.

Helvering v. Minn. Tea Co., 296 U. S. 378, 56 S. Ct. 269;

Virtue v. Creamery etc. Co., 227 U. S. 8, 33 S. Ct. 202.

No attempt to attack it was made before the lower court. None was made in the Circuit Court of Appeals. Indeed, in the first appeal to this court, it was treated as valid and proper. It is entitled to be accorded face value, and so the District Judge felt in approving it on January 7, 1939 (R. 26).

It is suggested (Br. p. 20) that the general denial did not attack the right of defendants to maintain the cause of action.

Plaintiffs, however, in filing the general denial, reserved the right to attack the counterclaim in any appropriate manner (Supplemental Statement, R. 75).

Furthermore, under a general denial, defendant (or plaintiff in case of a counterclaim) "* * * might prove any fact which went to show that plaintiff never had a cause of action against him."

Hoffman v. Parry, 23 Mo. App. 20, l. c. 29.

See, also:

Barr v. Lake, 147 Mo. App. 252, 126 S. W. 755, and Greenway v. James, 34 Mo. 328.

In closing this phase of the matter, we must refer to the statement that "all seventy-six of the plaintiffs violated" the stipulation. Elsewhere, the word "fraud" is used in this connection.

If violation there was, it was not knowingly done (Supplemental Statement, R. 75). It could not then be fraudulent.

Furthermore, numerous plaintiffs held interstate permits and licenses [R. S. Mo. 1929 as amended Sec. 5268, and General Order No. 33-A of the P. S. C. Rule No. 4 (f) (both appear in the Appendix)], authorizing operations in interstate commerce from and to all points in the State of Missouri, which permits and licenses, by the terms thereof, entitled those carriers to operate in the 10 and 20 mile zones in the conduct of border city operations.

D) Statutes Authorize the Public Service Commission to Collect License Fees.

Various statutes are cited which, by implication, are said to lodge with the Public Service Commission the capacity and duty to collect license fees.

It is first said that the duty to license necessarily implies the duty in the same agency to collect license fees. No authority is cited for this doctrine. It is certainly not the law in Missouri. As shown before in State ex rel. Winn, State Treasurer, v. Banks, supra, the licensing agent is not the collecting agent. Furthermore, suits to recover moneys due the State must be brought in the name of the State, and may not be prosecuted by the Public Service Commission.

R. S. Mo. 1929, Sec. 11276.

Indeed, the State Treasurer, by specific statute, has the duty to seek these fees.

R. S. Mo. 1929, Sec. 11425, provides that:

> "The state treasurer shall receive and keep, as provided by law, all the moneys of the state not expressly required by law to be received and kept by some other person; * * *."

Even if the inference petitioners draw were otherwise a fair one, it would not be permissible here. The State requires the Treasurer to collect fees not **expressly** required to be received by another. It does not except fees **inferentially** or by **implication** to be received by another.

Registration fees for motor vehicles likewise are payable to the State Treasurer.

R. S. Mo. 1929, Sec. 7761.

Instances of this nature could be multiplied. Suffice it to say we are unable to find a single instance in which the licensing authority can sue in its own name to collect the license fee.

A typical analogy is presented by the power of the police force. It has the duty to apprehend unlicensed drivers and to prevent the use of vehicles not properly

licensed under the law. It could not be seriously contended that therefore and by inference the police department could sue for and collect the fees. In fact, in the case of license fees and taxes asserted to be unconstitutional, the point is usually raised by injunction against the police authority to prevent interference with the operations of the plaintiff so asserting. It, of course, is not thereby conceded that that authority may collect the fee, or that the fee is payable to it.

It is sought, on page 22 (Brief), to establish the right in the Public Service Commission to **collect** fees because in certain instances it **fixes** fees. The delegation of incidental legislative functions as to fixing fees in no sense implies a further delegation of authority to collect them.

The deduction that the Public Service Commission can collect the fee where **it** fixes the amount, is a non sequitur in view of the premise that the Treasurer can collect the fee where **the Legislature** (directly) fixes the amount.

It is true the statutes discussed give certain power and authority to the Commission. However, nowhere is it purported to give to the Commission authority to collect license fees. In numerous sections of the statutes reference is made to the fact that the Commission shall have certain regulatory powers. The one section, however, that discusses **payment of the license fees** is silent as to the power or authority of the Commission. It says the fees shall be paid to the State Treasurer.

R. S. Mo. 1929, Sec. 5272.

Argument is made that this section provides merely that the Treasurer "shall receive the license fee"—an act consistent with the alleged right in the Commission to collect. Petitioners lose sight of the fact that this provision is subsequent to the affirmative provision of the stat-

ute (Appendix to Petitioners' Brief, p. 45). This provision requires that "* * * every motor carrier * * * **shall * * * pay to the State Treasurer of the State of Missouri, the annual license fee** as set out in this Act; * * *." (Emphasis supplied.)

It is said (Br. p. 24) the Commission **requires** that all checks be payable to the order of the State Treasurer. We say the requirement is that of the statutes and not of the Commission. Anent this discussion, would petitioners contend they could sue to recover on a check so payable if it were not honored?

Finally, of the argument about statutory implications, we say this: If the Legislature intended to empower the Public Service Commission to collect and to sue for the license fees, it would have been a simple matter to have so stated in the act. It was not attempted, expressly or by implication. In fact, the contrary purpose is clearly apparent.

E) The Public Service Commission Has Always Collected License Fees.

Rule 8, cited, provides for the payment of a fee in advance. It does not attempt to modify the statute as to the person to whom the fee is to be paid. The same is true of rule 13, mentioned on page 25.

We think the suggestion that the Treasurer does not have a representative present at every place a payment is due him is of little value. He should have to have, if such were the rule, a representative in every hovel, household, office or establishment, for the collection of some sort of tax or license fee.

Regardless of the above, the very rules of the Commission (appendix herein) themselves confirm this right in

the Treasurer and disavow it in the Commission. When speaking of a payment of the type the Commission can collect, provision is made for payment to the secretary of the Commission. However, when license fees are the topic, they provide for payment to the Treasurer.

Rule 5 deals with a docket fee on application for a certificate of convenience and necessity. It provides "the applicant shall pay to the secretary of the Commission a docket fee of five ($5.00) dollars." On the other hand, in dealing with a fee for license to be used by emergency vehicles (i. e., a fee under the general license fee provisions) it is provided in rule 23 "* * * there shall be paid to the State Treasurer of the State of Missouri an annual fee of $5.00 for each emergency vehicle * * *."

The implications of this are of additional force in view of the fact these rules were promulgated September 17, 1938, long after the counterclaim was filed. If the Commission felt or believed it had the right to sue for and collect license fees when the counterclaim was filed, it acted in a manner incompatible with that belief some months later, in promulgating these rules.

Finally, there is no merit in the argument that the rules establish the right to collect fees. The rule-making power of the Commission is subservient to its statutory powers.

F) Implied Powers of the Commission.

The previous argument is pursued further. What we have said above is equally pertinent here. We see nothing bearing on the question at issue, in any of the statutes cited. On the contrary, Section 5229, R. S. 1929, referred to, authorizes suits in the name of the State of Missouri, to enforce the powers of the Commission. It begs the question to assume collection of fees is one of the powers

of the Commission. And, if it were, the proceeding would have to be brought in the name of the State. This was not done. The citation defeats the purpose of petitioners.

The bill in equity contained no prayer to enjoin Public Service Commission from proceeding to collect the fees, as implied (Br. p. 28).

G) Eichholz Case Holds the Commission Is Proper Party to Maintain Action for Fees.

An analysis of the majority opinion affords no support for this contention.

The Court permitted the counterclaim to be considered because no objection was made. We quote from the opinion (supplying the emphasis, however), 23 Fed. Supp. 587:

> "Under Equity Rule 30, 28 U. S. C. A., following section 723, a defendant has a right to interpose a counterclaim 'arising out of the transaction which is the subject matter of the suit.' It is doubtful whether these claims arose out of the transaction which is the subject matter of the suit, and yet, because of the injunction, the plaintiff elected to discontinue the payment of fees.
>
> "**No objection having been made to the filing of the counterclaim, this court will not interpose one** under the circumstances of the case. The question having been presented, it should be considered by us."

In the instant case respondents reserved the right to challenge the counterclaim on any ground (R. 75). Since upon trial of the main issues in the suit it might devlop that the issues of the counterclaim became moot, it seemed to be unnecessary to launch full attack on the counterclaim at the outset.

The opinion of Judge Otis shows his viewpoint. This, from the above quotation, seems to have been concurred in by the majority, even though, in the absence of objection, they entertained the counterclaim.

The Otis opinion on this phase of the case says (l. c. 599):

"Defendants have asked leave to file a counterclaim. The plaintiff, it is alleged, owes the state fees for the use of the highways, which fees it has not paid. It is sought to recover them by this counterclaim. There are two reasons why I think the counterclaim should not be permitted to be filed, although I have little doubt that the fees sought are owing.

"Equity Rule 30, 28 U. S. C. A., following section 723, authorizes (1) a 'counterclaim arising out of the transaction which is the subject matter of the suit.' Also it authorizes (2) a 'counterclaim against the plaintiff which might be the subject of an independent suit in equity against him.' Two classes of counterclaim are thus provided for. Moore v. Cotton Exchange, 270 U. S. 593, 46 S. Ct. 367, 70 L. Ed. 750, 45 A. L. R. 1370. But obviously the counterclaim sought to be asserted here does not fall in class (2); it could not be made the subject of an independent suit in equity. (It might be made the subject of a suit at law.) Does it arise out of the transaction which is the subject matter of the suit?

"It is said in the opinion of the majority that it is doubtful if this counterclaim 'arose out of the transaction which is the subject matter of the suit.' I should go further in the same direction and say that it is certain the counterclaim does not arise out of the same transaction. What was 'the transaction' which is the subject matter of this suit?

"The Public Service Commission revoked or threatened to revoke the plaintiff's interstate permit and threatened then to prevent plaintiff operating without an interstate permit. The suit arises out of the withdrawal or threatened withdrawal of the permit

and consequences incident to that withdrawal. The right to fees arises out of the use of the state's highways by plaintiff. Certainly the (a) withdrawal of the right to use the highways and (b) the use of the highways are not the same thing, not the same transaction. They are scarcely comparable, but, if comparable, they are not comparable as resembling one another, but as opposites.

"It is true that the plaintiff is operating under our temporary injunction. Because he is operating he owes fees. It may be said then that the counterclaim arises because of the injunction, and that the injunction arose from the threatened withdrawal of the interstate permit. That, however, is a connection quite remote between counterclaim and 'transaction' and not the immediate connection which the rule requires.

"My second reason for believing this counterclaim should not be entertained is this: If plaintiff owes fees for the use of the highways of the state he owes them to the state or to the state treasurer for the state. Sec. 5272, R. S. Mo. 1929, Mo. St. Ann., Sec. 5272, p. 6689. He does not owe them to the Public Service Commission whose members are the defendants in this case. Nor have I found any statute authorizing the Commission to sue for such fees as the agent of the state.

"In my view a permanent injunction should issue and leave to file the counterclaim should be denied."

We do not undertake to tell this Court what it decided on this issue. It appears to us, however, that the Court was careful to preclude the possibility of a decision as to the counterclaim. In Eichholz v. Public Service Commission, 306 U. S. 268, l. c. 269, the Court said the decree as regards the counterclaim was not a final one. Hence, of course, it was not here for review.

In concluding the opinion, l. c. 275, the Court, lest there be doubt about it, ruled, "The decree of the District

Court, **so far as it denies an injunction,** is affirmed." (Emphasis supplied.)

The statement is made on page 31 (Brief) that this Court upheld the jurisdiction of the Three-Judge Court to allow the Public Service Commission to maintain the counterclaim. The foregoing anlaysis would appear to refute the statement.

Next the inference is drawn that since it was the duty of this Court to reverse the action of the Three-Judge Court on the counterclaim if the Public Service Commission could not maintain the action, therefore, from the failure to reverse, must be deduced a finding of power in the Public Service Commission to sue. Since the counterclaim was not before the Court, the failure to reverse and remand the action with reference to it, of course, gives rise to no inference of the nature suggested.

H) Attorney-General Also May Maintain Action to Collect Fees.

Respondents cite Section 11276, R. S. Mo. 1929.

That section, to be sure, authorizes the Attorney-General to institute suits to enforce rights of the state. But it is to be noted he is authorized to do so in his capacity of legal representative, i. e., as counsel, not as party litigant. The statute says, in part:

> "The Attorney-General shall **institute, in the name and on behalf of the state,** all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary." (Emphasis supplied.)

The cases cited at the top of page 32 sustain the position respondents take on the matter. In each of them the State itself, and not the Attorney-General (or Prosecuting Attorney), is the party litigant. The very style of the case, the caption, in each instance, is revelatory in that respect.

We conclude this section of the brief with this commentary.

While loudly asserting the motion for damages was properly brought by the defendants (all of them), the brief attempts to justify that right on the part of but two of them, the Public Service Commission and the Attorney-General. Thus it is, in effect, conceded that the other defendants could claim no right to sue. In the circumstances, the counterclaim will not lie, because of the defect of parties (it was filed before the present rules were in effect).

Plaintiff may not use the counterclaim or cross suit to introduce new parties, be it the State Treasurer or the State itself.

Rules of Practice in Equity Nos. 30 and 31;
Simpkins, Federal Practice, 1934 Edition, Section 708.

If the counterclaim was bad under the then existing Rules of Equity Practice, the Three-Judge Court was justified in dismissing it. If that ruling was correct when made, the later promulgation of the Rules of Practice in the District Courts would not vitiate the decision. This is true even though under the practice rules the Court might have viewed the matter differently. The new rules do not create or recreate a cause of action which had terminated or expired under the old.

McCrone v. United States, 300 U. S. 276.

II.

A) **Preliminary Discussion.**

First it is said that the arguments of point I sustain point II. The argument comes to this. If a certain element among several, the absence of which is fatal to the counterclaim, is found to be present, the failure to sustain the counterclaim (or motion for damages) is an abuse of discretion. True, if the person who has the right to sue is not prosecuting the claim, the defect is fatal. But the discretion of the Three-Judge Court goes far beyond determinations as to parties. The cases dealing with discretion to retain or remit ancillary litigation do not have such a narrow ambit, as will be seen.

The net result of point A is this hypothesis. If parties were such that the Court could decide in petitioners' favor, failure to do so is an abuse of discretion. The next step would be that any exercise of discretion resulting in a refusal to assume jurisdiction is an abuse of discretion. That is tantamount to saying that the Three-Judge Court has discretion concerning treatment of the counterclaim, only provided it exercises that discretion in the particular way for which petitioners contend—the reductio ad absurdum.

B) **Did the Three-Judge Court Abuse Its Discretion by Overruling the Motion for Damages?**

Here again we advert to the fact that petitioners, having said in point I that the Three-Judge Court **decided** the counterclaim (Brief 16 and 17) on the issue of parties, now urge that it abused its discretion in dismissing the counterclaim **without deciding** it. It is not clear, therefore, whether the "abuse" complained of lies in the failure to decide the counterclaim on the merits, or in the

alleged act of deciding it on its merits, but in a manner adverse to petitioners' desires.

The argument about rights in equity is again advanced. It, in effect, reasons that since equity enjoined defendants from forcing plaintiffs to pay the State Treasurer, equity therefore owes those defendants a correlative duty, that of forcing plaintiffs to pay to defendants what plaintiffs might otherwise have paid to the Treasurer. The Treasurer is, of course, not a party to the proceedings. There seems to respondents to be no equity in that. No authorities support the viewpoint.

On the subject of equity we remind petitioners that the normal method of suing to collect taxes is by individual suit against individual taxpayer in which he makes his personal defense and has the benefit of a trial by jury. Can it be so shocking to the conscience, so inequitable, that petitioners here, or the proper state functionary, should so proceed? The fallacy of the position of petitioners is this: They are not put to disadvantage by the decision. It but prevented them (or the proper authority) from having an unusual and extraordinary short-cut in the performance of usual and ordinary tax collecting functions. Had the state authority been permitted to ride herd over defendants in the collection of taxes, "equity" might well have been lacking. To be "remitted" to normal and usual rights cannot be branded as mistreatment.

It is said (Br. p. 33) the State is relegated to seventy-six different causes in many different forums. Again, we say the State is not relegated anywhere. There is no compulsion on it further to pursue these carriers any more than any other carriers similarly situated. The petitioners appear to feel no compulsion to harass the latter.

As to the talk of different forums, if the amounts in-

volved justify references made in the brief, the State or State Treasurer, pursuant to the Rules of Practice in District Courts of the United States, No. 20, may proceed against all nonresident respondents in **one court** and in **one proceeding**. Furthermore, they are all amenable to service by the simple expedient of serving process upon the secretary of the Public Service Commission.

R. S. Mo. 1929 (as amended), Sec. 5279.

In view of the foregoing, it will be seen that the State is not relegated or sent anywhere. If it chooses voluntarily to pursue these parties further, it can do so in the local courts, as to citizens of this State (exactly as it must proceed against carriers not party to the litigation—exactly as it would have been required to proceed but for the litigation). As to nonresidents, it can proceed against them in one action in a federal court within this very State and forum. The argument of petitioners is without basis in fact. There is no real hardship visited on them.

It follows that the claim of abuse of discretion, because of the supposed hardship, falls to the ground.

C) **Discussion of Applicable Decisions.**

(1) **United Motors Service, Inc., v. Tropic-Aire, Inc.**, 57 Fed. (2d) 479, is discussed. It is said that the case is distinguishable because there was but one plaintiff there to be proceeded against in a separate suit elsewhere. There was no such factor as many suits in many forums to which the defendant was remitted.

Argument under the preceding paragraphs show that the supposed distinguishing element is not present in this case. But, also, it is true that the discretion to hear or not to hear auxiliary matter is not dependent upon such considerations. No case is cited which considers that element.

No doubt, were the situation assumed to exist (the necessity of many suits in numerous forums), actually present it could be considered by the Three-Judge Court as an element affecting the discretionary judgment of the Court. But the argument is a two-edged sword. The Court might be impressed by consideration of the **rights** and **interests** of plaintiffs as strongly as by consideration of the **desires** and **conveniences** of defendants.

On page 39 the argument is renewed that the law-violating foreign carriers may come in swarms, violate our law, receive the protection of a federal injunction and then scurry back to their various foreign residences.

If they come in swarms, the police powers of this Commission enable it to choke off the traffic any moment. If they violate the law, they are immediately amenable to arrest, fine, and what is even more effective, stoppage. If these carriers seek injunctive relief without joining the State Treasurer, he can sue them for license fees. If they join the Treasurer, he may counterclaim for them. In both instances this can now be done in one forum and in one action.

Rules of Civil Procedure for the District Courts Nos. 18, 19, 20 and 22.

In view of the rights accorded by these rules and in view of the fact that the Three-Judge Court did not dismiss the counterclaim and motion for damages on the merits (only without prejudice), discussion about petitioners not having their day in court seems superfluous. Were the case dismissed on the merits, as a finality, it might be urged petitioners did not have their day in court. They are still entitled under the order, if so advised, to proceed by independent suit. They thus may, if they desire, have their "day in court." That, however,

seems not to be petitioners' real grievance. They really desire not a day in court before a competent tribunal with an opportunity to be heard, the elements of due process. They desire to choose the court, and the day and the circumstances (they seem to prefer a Master to a jury).

On page 35 it is suggested that the Court, by its indifference and abuse of discretion (if this case is affirmed), will have contributed to respondents' unjustified financial "victory." We cannot refrain from suggesting, with Pyrrhus, that one more such victory over the Romans and we are utterly undone.

A further distinction between the instant case and the Tropic-Aire case is said to exist in this; that affirmative relief in that case is not asked in the pleadings. We find no basis for this distinction. In the instant case a motion for damages was filed after the main issues had been ruled. In the Tropic-Aire case plaintiff secured an order on defendant to show cause why plaintiff's motion to dismiss its bill of complaint should not be granted. Defendant made response to this, alleging that dismissal should not be permitted until defendant's loss and damage should be assessed and paid. Defendant presented a request and order "that the defendant recover of the plaintiff and sureties on the injunction bond such damages as defendant has suffered by reason of the issuance of said injunction." Reference to a Special Master was also sought as in the instant case (57 F. [2d], l. c. 480).

The entire subject of discretion with reference to auxiliary matters in injunction suits was fully considered in the Tropic-Aire case. Nowhere can we find a more complete and learned treatise on the subject. Accordingly, we quote at length (l. c. 484 et seq.):

"(7) Defendant argues that it had the **right** to

have the trial court assess its damages in the equity action. While the **power** unquestionably exists in the trial court to assess such damages, it was clearly discretionary with that court to retain the case and in an ancillary proceeding as incident to the main case determine such damages or leave the parties to an action at law. There is no duty on the trial court to wind up the matter of damages in the equity suit. In the leading case, Russell v. Farley, supra, the court said with reference to this, page 446 of 105 U. S., 26 L. Ed. 1060:

> "'But whilst the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet if it has that power, it is in the discretion to exercise it, or to leave the parties to an action at law. No doubt in many cases the latter course would be the more suitable and convenient one. * * *
>
> "'But the appellants contend that, even if the court had the power to pass upon the question at all, its decision was erroneous, and ought to be reversed on the merits. On this point, the judgment of the court approaches so near to an exercise of discretion, that we should require a very clear case to be made in order to induce us to reverse it. The conduct of the parties and the course of litigation in the court below pass so directly under the inspection of that court, as to give it many advantages which no other court can possess, for forming a correct decision on the question, whether any extra damages should be allowed for the issuance of the injunction.'

"In Baker & Bennett Co. v. N. D. Cass Co. et al., 224 F. 439, 440 (C. C. A. 2d), the appellate court refused to interfere with the discretion exercised by the trial court in refusing to assess the damages in the equity suit as demanded by defendant. It held that on dissolution of the preliminary injunction, for which a bond was given, the court had the discretion to determine the liability thereon or to leave the de-

fendant to his remedy by an action at law. We quote from that decision as follows: 'We do not understand that Judge Lacombe, in denying the petition for the appointment of a special master, intended to hold that the defendants were not entitled to recover at all, but only to exercise the discretion that lay in him to say whether the liability upon the bond should be determined in an ancillary proceeding in this cause or in an independent action at law.'

"In Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, 279, 37 S. Ct. 283, 286, 61 L. Ed. 715, Ann. Cas. 1918 C, 1147, the Supreme Court in discussing whether a court of equity had jurisdiction to render summary judgments on a bond because there might be an adequate remedy at law, and holding that such objection is not good and that a court of equity having complete jurisdiction will dispose of all incidents to the case and end further litigation, says: 'The objection that a court of equity has no jurisdiction because there is an adequate remedy at law on the bond is not well taken. A court of equity, having jurisdiction of the principal case, will completely dispose of its incidents and put an end to further litigation.' The latter sentence is of course merely dictum.

"On the general question of the power of courts of equity to retain the case and assess damages, see Lea et al. v. Deakin (C. C.), 13 F. 514; Coosaw Min. Co. v. Farmers Min. Co. et al. (C. C.), 51 F. 107; Tyler Min. Co. et al. v. Last Chance Min. Co. (C. C. A.), 90 F. 15; Leslie v. Brown et al. (C. C. A.), 90 F. 171; Cimiotti Unhairing Co. et al. v. American Fur Refining Co. et al. (C. C.), 158 F. 171; Nashville C. & St. L. Ry. v. Railroad Commission (C. C.), 171 F. 223; Mississippi Valley Fuel Co. et al. v. Watson Coal Co. (C. C. A.), 202 F. 122; Williams v. O'Toole (C. C. A.), 211 F. 484; Bellamy v. St. Louis, I. M. & S. Ry. Co. (C. C. A.), 220 F. 876; Baker & Bennett Co. v. N. D. Cass Co. et al. (C. C. A.), 224 F. 439; United States Fidelity & Guaranty Co. v. Burke et al. (C. C. A.), 238 F. 881, Ann. Cas. 1918 C 93; Martin v. Barth et al.

(C. C. A.), 25 F. (2d) 95; Owl Creek Coal Co. v. Big Horn Collieries Co. (D. C.), 36 F. (2d) 485; Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, 37 S. Ct. 283, 61 L. Ed. 715, Ann. Cas. 1918 C 1147.

"Many courts of original jurisdiction have laid down rules with reference to this matter and have regarded it as the better practice for the court in the equity suit to determine the damages. For instance, in Owl Creek Coal Co. v. Big Horn Collieries Co. (D. C.), 36 F. (2d) 485, the court reviews many of the federal decisions upon the subject and states that defendant may in an ancillary proceeding summarily enforce a bond against the surety, and that the defendant ordinarily will not be remitted to his remedy at law. Same doctrine Lea v. Deakin (C. C.), 13 F. 514.

"We think there can be no well-considered authorities cited holding that under the circumstances such as here presented there was no discretion in the trial court to hold the case and assess the damages or to relegate defendant to an action at law on the bond and that it must prior to granting dismissal settle the question of damages. It makes no difference that certain courts have expressed their opinion that discretion should be exercised in one direction rather than the other or that perhaps better reasons appear for choosing the alternative followed than may be available in the instant case. There is no particular reason why defendant should have the right to have the damages assessed in the equity suit instead of in an action at law because he may consider one alternative better for it than the other. While a master in equity and a jury at law might differ as to the damages, the proceedings are supposedly equally effective. The argument that greater damages could be assessed in the equity suit proper we have shown to be unsound. The refusal of the District Court to assess damages under the injunction bond in the equity suit proper as requested by the defendant was not an abuse of discretion."

To sum up. We grant that the Three-Judge Court in a proper case, and with proper parties, has the **power** to retain ancillary matter. That does not militate against its **right**, in the exercise of discretion, not to entertain such matter. Nor does it give the parties the right to insist on such retention.

After exhaustive search, the Court in the Tropic-Aire case found no well-considered authorities holding that the lower court did not have discretion to leave the parties to their rights elsewhere concerning damages (l. c. 485). Petitioners likewise have been unable to find such. Respondents also.

(2) The Eichholz case is discussed elsewhere.

(3) **Russell v. Farley, 105 U. S. 433,** is cited in support of petitioners' contentions concerning the alleged rule regarding summary action on injunction bonds in the primary court.

Russell v. Farley, however, concedes the general rule to be to the contrary, but holds merely that the injunction court **may** have the damages assessed under its own authority.

The opinion also establishes the fact that the Court has the **power** to order the incidents to be disposed of elsewhere. We quote from the same paragraph petitioners quoted, 105 U. S., l. c. 446:

> "**But whilst the Court may have** (we do not now undertake to decide that it has) **the power to assess the damages, yet if it has that power it is in its discretion to exercise it or to leave the parties to an action at law.** No doubt in many cases the latter course would be the more suitable and convenient one." (Emphasis ours.)

The case upholds the action of the Three-Judge Court in all respects. The action of the Circuit Court of Appeals in affirming the ruling likewise presents no conflict with Russell v. Farley.

Of course, the opinion, rendered in 1882, could not have envisioned the situation created by the passage of Section 266, Judicial Code (28 U. S. C. A. 380), years later.

(4) **Inland Steel Co. v. U. S., 306 U. S. 153.** The foregoing comment on Russell v. Farley, supra, pertains as well to the Inland case.

(5) **Owl Creek Coal Co. v. Big Horn Collieries, 36 F. (2d) 485,** a district court case, goes no farther than the rest. It holds that the trial court **may,** in its discretion, retain the case, or it **may,** in its discretion, remit the parties to other proceedings.

At the bottom of page 37, petitioners (inadvertently, no doubt) themselves give recognition to the true rule. They say that by its order the Court "* * * acted in conflict with the uniform rule in all circuits, **permitting** the Court, **in its discretion,** to render judgment for damages on the injunction bond * * *." (Emphasis supplied.)

If petitioners really recognize and concede this to be the true rule, there is no disagreement between us. Nor is it of consequence, in considering the **existence** of discretion vel non in which way the courts may "favor" exercising it.

(6) **Camp v. Boyd, 229 U. S. 530,** states a broad general principle in circumstances which present no analogy to the instant situation.

(7) **Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273,** is cited. That case dealt with summary judgment

against sureties on an **appeal** bond, and hence is not apposite. It does not hold that the Court, even in such circumstances, may **not** remit the parties elsewhere for relief.

The quotation from the opinion, we deduce from the use of italics, is chiefly to emphasize this statement, "a court of equity, having jurisdiction of the principal case, **will completely dispose of its incidents and put an end to further litigation.**"

"The latter sentence is, of course, merely dictum," said the Court in the case of

United Motors Service v. Tropic-Aire,
57 Fed. (2d), l. c. 485.

In concluding consideration of this doctrine, we reiterate no case is shown where the discretionary right to remit the case elsewhere was denied. Cases distinctly stating this right in the affirmative are, of course, rare. And the reason is obvious. So well established is the rule that no one can controvert its existence. Few have had the hardihood to try. Instead, all have recognized that right as a premise. Some have urged the existence of a correlative right and power in the injunction court, in the exercise of its discretion, to entertain the motion for damages itself. Hence the cases petitioners cite.

D) **Equity Will Do Complete Justice.**

We concede the general proposition to be sound. More frequently it is stated that equity having jurisdiction of a cause **may** retain jurisdiction to award complete relief.

(1) **Sterling v. Constantin, 287 U. S. 378,** is cited. The case and the quotation have no bearing here. No counterclaim was involved. It holds that a Three-Judge Court,

having properly obtained jurisdiction under the statute, could deal with pertinent questions of law arising under the State Constitution and statutes, as well as under the federal law.

(2) The second case here noted is **Railroad Commission v. Pacific G. & E. Co., 302 U. S. 388.** As the quotation indicates, this case holds that the Three-Judge Court having jurisdiction was not confined to consideration of federal law, but could consider points of local law involved. There was no counterclaim.

(3) The third case is **Sovereign Camp v. Murphy, 17 Fed. Supp. 651.** This was another case in which it was held that the Three-Judge Court, its jurisdiction properly invoked, had authority to try the entire case presented by plaintiff, including issues not involving constitutional questions.

(4) It is said equity courts will do complete justice, likewise, in cases involving counterclaims.

Lehman v. Krentler etc. Co., 284 U. S. 448, cited here, was a contempt proceeding for violation of an injunction against patent infringement. The Court was not a Three-Judge Court. It was said that plaintiff, by bringing the suit, submitted to the jurisdiction of the Court all issues embraced in the suit, including the counterclaim. That was no more than to say that in the instant case the Three-Judge Court had authority and power to consider the counterclaim. It did so, and, in its discretion, dismissed the same.

Young Co. v. McNeal-Edwards Co., 283 U. S. 398, next cited, dealt with a Massachusetts statute concerning non-residents bringing suit in that state. They were required to answer in an action brought by the opposite part involving the same subject matter. It was held that the

Massachusetts statute was enforceable in the federal court. No counterclaim was involved. A separate suit was under consideration.

(6) **Chicago etc. Ry. Co. v. Lindell, 281 U. S. 14,** is quoted. The case is not a Three-Judge Court case (true, likewise, of the McNeal-Edwards case, supra). Also the "pernicious" result inveighed against there could not occur here. This was discussed in connection with the argument that swarms of law violators could intrude with impunity and scuttle away again without penalty.

E) Abuse of Discretion to Disallow Expenses of Defense.

Pertinent parts of the motion for damages are quoted in the statement. They show that the motion sought **license fees** as the sole "damages." The answer, then, to this charge is clear. **The motion nowhere sought the allowance of "expenses."**

There is this additional circumstance. Petitioners, Public Service Commission and Attorney-General, undertook to preempt the field. They exhausted their rights by filing the motion for costs (R. 73). This motion was abandoned. No attempt was made to preserve the point. It is a dead issue and would be, likewise, even if "expenses" had been included in the motion.

The contention is probably urged in an efforts to show some dissimilarity between the object of the counterclaim and that of the motion for damages. That, in turn, to furnish basis for claiming, therefore, that not all the subject matter of the latter was ruled on in connection with the former.

This, and the discussion about costs, appear to lack forthrightness.

Viewed as a motion for costs, even, the motion for damages would still be ineffectual since it was not filed during the judgment term.

32 C. J. 442;
Fears v. Riley, 147 Mo. 453, 48 S. W. 828;
Joplin State Bank v. Heaton (Mo. App.), 180 S. W. 19.

In petitioners' brief in the Circuit Court of Appeals the same point was asserted and later abandoned.

III.

Duty to Remand Motion for Damages to District Judge.

It is not here asserted that there is such a duty. A duty is suggested by way of rhetorical question.

Petitioners here (p. 41), refer to their treatment of the subject in the summary (p. 13).

If there is merit to the suggestion, let us first see if petitioners may raise it now. To begin with, the "rule," if it exists, requires the Three-Judge Court, **upon presentation of the facts** by the parties, to remit the ancillary matter to the District Judge.

No oral or written motion was ever made or other action taken in the lower court by way of "presentation of the facts" warranting such remission or suggesting the propriety of it.

The contention was not set forth in the petition for rehearing there (R. 63). The motion for damages was filed to the full Three-Judge Court (R. 79). It was ruled on by the Three-Judge Court as such (R. 83). No suggestion of the "rule" or "presentation of the facts" was contained in the motion to set aside the order overruling motion for damages (R. 83). That, in turn, was ruled by

the Three-Judge Court as such, without objection or exception by petitioners (R. 89).

The Brief filed here on the direct appeal was barren of such suggestion. No error was assigned for failure to remit to the District Judge in that appeal (Public Service Commission v. Brashear etc. Co. et al., 306 U. S. 204). Nor was such an assignment of error made in the appeal to the Circuit Court of Appeals (R. 95). (See, also, Brief of Appellant in Circuit Court of Appeals.)

These other courts were justified in not considering action or nonaction as to matter not urged.

This Court should not disturb the judgment below in view of the untimely obtrusion of the point. Petitioners may not for the first time raise new matter in their petition for certiorari.

Helvering v. Minn. Tea Co., 296 U. S. 378, 56 S. Ct. 269;
Virtue v. Creamery etc. Co., 227 U. S. 8, 33 S. Ct. 202.

It is not seen how the result would have been different had the motion for damages been remitted to Judge Collet. His concurrence in the order overruling the motion for damages establishes his view on the subject. He, if the sole Judge, would have dismissed the counterclaim and overruled the motion, precisely as he voted to do and concurred in doing on the record presented.

Of course, this rule, as envisaged by petitioners, posits only a remission to the District Judge for proceedings "independently of Section 266 of the Judicial Code." The "rule" does not force him then to assume jurisdiction. He would have the same discretion as the Three-Judge Court, to hear the matter or "relegate" the parties elsewhere.

Indeed, most of the cases petitioners cite in discussing the subject of discretion dealt with decisions of one Judge and were not Three-Judge cases.

It would be a futile act now, if it were determined that such a rule existed, to refer the motion to Judge Collet, since he would no doubt rule, as before he joined in ruling, that the counterclaim or the motion should be dismissed without prejudice.

Two additional comments are appropriate here.

Again, petitioners say it is unimportant to them whether the matter is before the Three-Judge Court or the One-Judge Court. Still, they take no position relative to the question they ask.

Petitioners again talk about their day in court. This suggestion loses sight of the fact the order dismissing the counterclaim did not foreclose action elsewhere.

It is said the Brashear case prevents a direct appeal to this Court on a counterclaim, if the injunction issue is not appealed. And it is said that Columbia Terminals v. Lambert, 309 U. S. 620, establishes the principle that **the Supreme Court will dismiss outright a direct appeal on a counterclaim,** if the injunction issue **is** appealed.

If petitioners have correctly analyzed the latter case, here is a recent and binding precedent governing the case at bar. This Court, on the authority of the Columbia Terminals case, should dismiss the petition for certiorari, and affirm the action of the Circuit Court of Appeals.

Respondents have no objection to the enunciation of a clear rule as petitioners advocate (Brief 43). It should be, however, a rule to operate **in futuro** so as not to disturb respondents' rights correctly ruled on below.

We believe petitioners have not shown that they were unjustly treated elsewhere. We believe their brief does not make a case of a just grievance. Accordingly, the action below should be affirmed, regardless of the desirability of establishing a rule of procedure in such matters.

Finally, it is urged that petitioners were discriminated against, inasmuch as appealing parties in other cases were saved by the Court from the consequences of improvident wrong appeals.

That, of course, is a matter for consideration in those particular cases, and could have been urged in a request for rehearing in the direct appeal.

Whether this Court saves some appellants and not others from the effects of inadvertence is not to be considered when determining whether or not the Circuit Court of Appeals ruled correctly on the record presented to it. That, strictly speaking, is not part of the record before the Circuit Court of Appeals, and hence not part of the record here.

After all, petitioners' real objective seems to have been to have this matter heard in this court. This objective they have attained. They should not now be heard to complain on that score.

The judgment of the Circuit Court of Appeals, we earnestly urge, should be affirmed.

Respectfully submitted,

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APPENDIX.

General Order No. 33-A of the Public Service Commission.

Rule No. 4 (f). If applicant proposes to operate over an irregular route, there shall be a statement showing the stand or location from which, and the territory within which, applicant proposes to operate, and the proposed tariff schedule or schedules showing the rates, fares and charges proposed to be made for the contemplated service.

Rule No. 23. Emergency Vehicles.—Provisions for and How May Be Used.—Every motor carrier at the time of licensing a motor vehicle, trailer or semitrailer may elect to have described on his or its annual license card two emergency vehicles of weight carrying capacity not greater than that of the licensed vehicle. Either of such described two emergency vehicles will be allowed to operate or be used in lieu of the licensed vehicle, as emergency. Only one of such three vehicles as shown on the annual license card may be operated in the State at any one time; and when either of the emergency vehicles shown on the annual license card is being operated it must carry the annual license card as provided by this Rule of order herein. Upon the issuance of the annual license card above described if the licensed carrier elects to describe one or two emergency vehicles as provided for above, there shall be paid to the State Treasurer of the State of Missouri an annual fee of $5.00 for each emergency vehicle described in the aforesaid annual license card.

R. S. Mo. 1927, Sec. 5268. A motor carrier not operating over a regular route may, within the territory permitted to be served by him, receive persons or property at a point located on a regular route and destined to a point not located on a regular route, and receive persons or property at a point not located on a regular route and destined to points on a regular route.